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STATE OF NEW YORK
EXECUTIVE DEPARTMENT
STATE CONSUMER PROTECTION BOARD

Timothy S. Carey
Chairman and Executive Director

George E. Pataki
Governor

Ann Kutter
Deputy Executive Director

September 29, 1997

Office of the Secretary
Federal Communications Commission
1919 M Street, N.W. Room 222
Washington, D.C. 20554

Re: CC Docket No. 94-129: Implementation of the Subscriber Carrier Selection Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers.

Dear Mr. Secretary:

Enclosed are an original and eleven copies of the Reply Comments of the New York State Consumer Protection Board in Docket No. 94-129. A copy is being provided to Ms. Cathy Seidel of the Common Carrier Bureau. In addition, copies are being filed with the Formal Complaints Branch of the Enforcement Division and with the Commission's copy contractor.

Also enclosed is a copy of our comments on diskette, in the format specified by the Commission. A diskette containing our comments is also being provided to Ms. Cathy Seidel.

Sincerely,

Timothy S. Carey

Timothy S. Carey
Chairman and Executive Director

Enclosures
TSC/DE

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FEDERAL COMMUNICATIONS COMMISSION

In The Matter Of	CC Docket No. 94-129
Implementation of the Subscriber Carrier Selection Change Provisions of the Telecommunications Act of 1996 Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers	

REPLY COMMENTS OF THE NEW YORK STATE CONSUMER PROTECTION BOARD

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Dated: September 29, 1997
Albany, New York

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FEDERAL COMMUNICATIONS COMMISSION

In The Matter Of	
Implementation of the Subscriber Carrier Selection Change Provisions of the Telecommunications Act of 1996 Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers	CC Docket No. 94-129

REPLY COMMENTS OF THE NEW YORK STATE
CONSUMER PROTECTION BOARD

The New York State Consumer Protection Board (NYSCPB) -- a state agency which represents the interests of New York's residential consumers, small businesses and farms -- respectfully submits these comments in reply to the initial comments of Bell Atlantic, AT&T, Sprint Corporation, Frontier Corporation, and MCI Telecommunications Corporation, which were filed in response to the Federal Communication Commission's (FCC's or the Commission's) Further Notice of Proposed Rule Making and Memorandum Opinion and Order on Reconsideration released July 15, 1997 (NPRM and Order). In general, the NYSCPB will not repeat the arguments it presented in its initial comments, filed September 12, 1997. We are concerned that the proposals of the above-mentioned parties, if adopted by the FCC, will not adequately prevent slamming or protect consumers who are the victims of slamming.

In Point I, we explain that consumers should be made whole for all the costs of slamming and that industry proposals would not achieve that objective. The consumer should be returned to the authorized carrier, not liable for the costs or profits of the illegally acquired account, and be provided all benefits to which he or she would have been otherwise entitled had the slam not occurred.

In Point II, we demonstrate that AT&T's proposal to ease the restrictions on the use of the "negative option" Welcome Package is inappropriate and should be rejected.

We explain in Point III why the rules established for out-bound marketing calls should be applied to in-bound calls, contrary to the proposals of AT&T (pp. 21-36) and Sprint (pp. 30-33).

Finally in Point IV, we demonstrate that the mailing of freeze information by incumbent carriers should also include information about how freezes can be removed and should not include marketing information.

Based upon our review of the initial comments of the parties listed above, the NYSCPB urges the FCC to:

1) Establish rules that hold that consumers are not liable for the costs and profits of service not requested or authorized by them, for a period of up to four months of such service.

2) Assure that its rules require prompt restoration of service and premiums that would have accrued to the benefit of the consumer had the slam not occurred.

3) Reject the proposal that Welcome Package restrictions be eased and instead ban their use entirely.

4) Apply the same verification rules to both in-bound and out-bound calls that result in a change of carrier.

5) Reject Bell Atlantic's proposal to permit carriers to provide promotional materials regarding carrier freeze programs.

6) Require telecommunications companies to provide

consumers information related to how freezes can be overridden along with the educational material regarding freezes and their imposition. The Commission should also consider requiring carriers to use standard language to describe PC freezes.

Each recommendation is detailed below.

I. SLAMMED CONSUMERS ARE ENTITLED TO REFUNDS OR TO WITHHOLD PAYMENT.

A. Slammed Consumer's Are Not "Made Whole" By Restoration Of Their Authorized Preferred Carrier And Lost Premiums.

Consumers who are slammed do not merely lose their premiums and the provider of their choice. Yet Bell Atlantic (p. 3), AT&T (pp. 8-11), Sprint (pp. 27-30), and MCI (p. 19) all recommend that carriers only be required to restore lost premiums and return consumers to their authorized carrier. While all state that the slamming carrier is not entitled to any revenue from the slamming action, they would only refund to the consumer the portion of revenues above what they would ordinarily have paid to their authorized carrier, if any. (Id.) The authorized carrier would be entitled to the balance, although they have not incurred the costs involved to provide the service.[1]

When slammed, consumers lose items of tangible value such as their calling cards and other services provided by their preferred carrier. They also lose intangibles such as reduced service

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[1] Bell Atlantic states it somewhat differently, albeit with the same result: "The Commission should give subscribers the option of paying their authorized carrier ... instead of paying the slamming carrier." (p. 3)

quality, time in correcting the problem, personal privacy, and choice. A solution that does not include absolving consumers from liability for providers they have not authorized is neither equitable nor can it be construed as making the consumer whole.

MCI states that:

> it would be bad public policy to permit consumers to pay nothing for services provided by an authorized carrier. (p. 19)

What MCI misses is the fact that the authorized carrier has <u>not</u> provided services to the consumer. Requiring the slamming carrier to reimburse the authorized carrier for full revenues lost would allow the authorized carrier to recover costs it did not incur. We do not dispute this inherent penalty mechanism that deprives the slamming carrier of cost reimbursement as well as profits on the slammed transaction. We also expect that the industry will take more action to self-police, thereby reducing the problem, as slamming erodes earnings. We would add to that inherent penalty the consumer's right not to pay for services for which a valid contract did not exist. Thus it would be incumbent upon the slamming carrier to make all injured parties whole, instead of dividing the refunds of consumer payments between injured parties, as MCI implies.

B. Consumers Should Be Reimbursed Promptly Upon Reestablishing Service With Their Preferred Carrier.

As we stated in our initial comments, consumers should be made whole promptly. (pp. 11-12) MCI, however, proposes that consumers not be reimbursed for their lost premiums until their authorized carrier recovers its profits and costs which have not been incurred. (p. 23) Restoration of the consumer should not be held hostage to the proceedings between two carriers.

Further, as Sprint points out:

> In any case, the carrier accused of slamming may be able to avoid liability entirely by refusing to pay the amounts collected to the properly authorized carrier. Its refusal would, in turn, require the authorized carrier to file a complaint with the Commission in order to secure foregone revenues. However, the authorized carrier may be unwilling to incur the expense of a complaint proceeding, especially if the amounts involved are small. (pp. 23-24)

It is very likely that the carrier and the consumer would have a different definition of what constituted a small amount. Since the authorized carrier decides whether or not to pursue the amounts owed it, and how quickly to do so, it is entirely appropriate to require reimbursement of premiums to the consumer promptly upon the reinstatement of service with the preferred carrier. To do otherwise would create a situation where consumers would be made whole only if their authorized carriers were inclined to pursue their lost revenues and were successful in doing so. This was not the intent of Congress or the FCC.

C. MCI's Proposal To Limit Consumer Withheld Payments Or Refunds To The Date The Consumer Receives The First Evidence Of Slamming Should Be Rejected.

MCI has suggested that, should the Commission reject its proposal that slammed consumers are not entitled to either withhold payments or receive refunds of payments already made to slamming carriers, any refunds or withheld payments "should be limited to the period between the switch and receipt of the first bill reflecting the switch." (p. 20) This proposal would place the burden on the consumer to open the bill immediately, examine it thoroughly enough to verify a slam, and report the slam to the appropriate authorities. Any delay on the part of the consumer in discovering the slam would work to his or her detriment. This is not only inappropriate, but would cause more problems than it would solve.

First, as Sprint acknowledges, "since it may take some time for consumers to `become aware of the unauthorized PC change,' these [slamming] carriers are able to receive revenue for carrying the traffic of slammed consumers before these consumers are returned to their authorized carriers." (p. 21) Consumers typically do not rush home and open their telephone bills to see if they have been slammed. By the time payment is due on the first bill that includes slamming charges, the consumer has already been slammed for up to two months in many cases. Allowing consumers four months of protection from payments for unauthorized service, is a reasonably balanced measure.[2]

[2] We note that Sprint indicates that the New York Public Service Commission (NY PSC) did not adopt a proposed rule to require consumer refunds for up to four months. (p. 29) NYSCPB wishes to draw the attention of both Sprint and the Commission to the proposal made by the New York Department of Public Service in its initial comments on this matter. It recommends that consumers be absolved of liability through 90 days following the first bill notice of the alleged slam, which is consistent with NYSCPB's proposals. (p. 11)

II. WELCOME PACKAGE RESTRICTIONS SHOULD NOT BE EASED.

As the NYSCPB stated in its initial comments, the "negative option" provision of the Welcome Package verification method should be banned since it can be used as a virtual "negative option" letter of authorization, which has already been banned by the Commission. (pp. 17-18) AT&T, however, proposes that not only should they not be prohibited, but that the restrictions on their use be eased. (pp. 5-7) AT&T's logic is that since this admitted loophole in the Commission's regulations has not been demonstrated as a major source of slamming problems, there is no need to eliminate it. (p. 6) AT&T's logic is flawed.

As NYSCPB demonstrated in its initial comments, the Commission and the states who will be enforcing these rules need an auditable trail to determine whether an alleged slamming incident was willful or an error. (p. 19) Allowing "negative option" verification of an unrecorded oral request for a change in carrier would greatly inhibit any attempt at enforcement of the Commission's regulations.

It is apt to note here that both Frontier (pp. 18-19) and MCI (pp. 2-5) favor eliminating the Welcome Package verification option entirely. MCI advises the use of third party verification (TPV) for all consumer carrier changes. (p. 3) This could stand as a model for responsible carrier behavior.

III. CARRIER CHANGE VERIFICATION RULES SHOULD BE APPLICABLE TO IN-BOUND CALLS.

AT&T states that the Commission would be "ill-advised" to apply the same verification rules for in-bound consumer calls as those for out-bound solicitations. (pp. 111, 21-36) Not only has NYSCPB demonstrated in its initial comments how in-bound calls can be abused in a manner similar to out-bound calls (pp. 21-22), MCI has indicated that "a substantial reduction in the number of complaints" has resulted each time it applied verification to a new category of sales, including inbound calls. (p. 3) MCI goes further to state:

> If the Commission were to apply verification rules to virtually all types of marketing except in-bound, it would practically be drawing a map for companies that seek to take advantage of consumers with questionable or illegal marketing practices.(p. 10, footnote omitted)

Clearly, the Commission should take steps now to prevent such a result.

IV. INDUSTRY PROPOSALS TO LIMIT CARRIER FREEZE INFORMATIONAL MATERIALS SHOULD BE REJECTED.

We explained in our Initial Comments that the FCC should adopt rules to ensure that carrier freeze programs are implemented in a competitively neutral manner and that the FCC's carrier change verification procedures are applicable to freeze requests. (pp. 12-17, 19-21)

We also supported the FCC's proposal (p. 23) that carriers provide information about carrier freeze programs but limit the use of promotional information relating to freezes. (CPB, p. 16) Bell Atlantic disagrees with that Commission proposal, stating that promotional materials relating to carrier freezes may be provided as long as such materials are "separate or separable" from the freeze verification form itself. (p. 4) That proposal should be rejected. The Commission properly recognized the likelihood that promotional materials regarding carrier freezes would be anti-competitive and proposed rules that would appropriately limit such promotional materials. (at 23)

We also do not support Sprint's claim that local exchange companies should not be required to send subscribers information about PC freezes. (p. 34) Sprint's position cannot be squared with the need to inform consumers of the availability of freeze programs and their operation. Consumers must be made aware of opportunities to help prevent slamming. That objective would be achieved under the FCC's proposal to permit companies to provide educational materials which explain the nature of carrier freezes and the procedures for requesting them, contrary to Sprint's contentions.

We support certain industry proposals regarding carrier freeze programs. In particular, we agree with MCI's suggestion that carrier freeze educational packages include information which informs consumers how to nullify, change or override a freeze. (MCI, p. 16) Consumers require such information to make an informed choice of whether to freeze their current provider. Such information is also required for consumers to exercise their ability to choose among telecommunications companies.

We also support MCI's proposal that the Commission consider requiring the use of standard language to "describe PC freezes, how they work, their impact on the ability to switch carriers and how they can be removed." (MCI, p. 17) Requiring some standard language would ensure that all consumers have necessary information regarding PC freezes. It would also help eliminate disputes among competitors as to whether particular PC freeze programs are anticompetitive, thereby reducing the burden on the FCC to resolve such disputes. Companies would be free to design their own carrier freeze informational packages within parameters established by the FCC.

However, we cannot support MCI's recommendation that a sale verified by a third party "should override a PC freeze." (p. 18) Since the executing carrier would not be expected to verify the submitting carrier's change order, the only protection consumers would have against unauthorized PC changes would be establishing a freeze. Under MCI's proposal, a change order verified by a third party would take precedence over a consumer requested freeze. However, the executing carrier would not have independent knowledge of whether the order was in fact verified by a third party. Therefore, MCI's proposal would eliminate the benefits of the freeze. As explained by NYSCPB in our Initial Comments, for freezes to have any meaning, executing carriers must determine whether a freeze is in place before executing a PC change order. (p. 12-14)

CONCLUSION

The New York State Consumer Protection Board urges the FCC to:

1) Establish rules that hold that consumers are not liable for the costs and profits of service not requested or authorized by them, for a period of up to four months of such service.

2) Assure that its rules require prompt restoration of service and premiums that would have accrued to the benefit of the consumer had the slam not occurred.

3) Reject the proposal that Welcome Package restrictions be eased and instead ban their use entirely.

4) Apply the same verification rules to both in-bound and out-bound calls that result in a change of carrier.

5) Reject Bell Atlantic's proposal to permit carriers to provide promotional materials regarding carrier freeze programs.

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Respectfully submitted,

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